Supreme Court, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1311

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, AMERICAN OIL COMPANY, a/k/a AMOCO OIL COMPANY AND STANDARD OIL COMPANY (INDIANA),
Petitioners,

v.

FRED WEBER, INC.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals	1a
Opinion of the Court of Appeals Denying Petition for Rehearing and Rehearing En Banc	15a
Opinion of the District Court for the Eastern District of Missouri	17a
Billing Statement of the Lashly Firm	23a

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 77-1571, 77-1599, 77-1616

FRED WEBER, INC.,
Appellee,

v.

SHELL OIL COMPANY, SHELL PIPE LINE CORPORATION,
AMOCO OIL COMPANY and
STANDARD OIL COMPANY (INDIANA),
Appellants.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: September 14, 1977

Filed: November 30, 1977

Before STEPHENSON and VAN OOSTERHOUT, Circuit Judges, and MARKEY,* Chief Judge.

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* The Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

MARKEY, Chief Judge.

Appeal from an order of the United States District Court for the Eastern District of Missouri, 432 F. Supp. 694 (E.D. Mo. 1977), denying defendants' motion to disqualify plaintiff's counsel. We affirm.

Background

Among the defendants in the present civil antitrust suit are Shell Oil Company (Shell) and American Oil Company (Amoco), which seek the disqualification of Lashly, Caruthers, Thies, Rava & Hamel (the Lashly firm) as counsel for plaintiff Fred Weber, Inc. (Weber).

The Lashly firm was counsel for some of Shell and Amoco's codefendants in a prior criminal antitrust suit, *United States* v. *American Oil Co.*, 65 C.R. 150(3), brought in 1965. Shell and Amoco are represented here by the attorneys who represented them in the prior suit. That suit terminated in November 1965 when Judge Regan accepted pleas of *nolo contendere* from all defendants.

Judge Regan, the judge in *American Oil*, recused himself from the present suit on his own motion, in accord with the ABA Code of Judicial Conduct, Canon 3C(1)[1] and 28 U.S.C. § 455.[2] Order of December 10, 1976. One month later, and eight months after being sued for conspiracy to violate the antitrust laws in the present suit, Shell and Amoco filed their motion to disqualify the Lashly firm in view of Canons 4, 5, and 9 of the ABA Code of Professional Responsibility.[3]

[1] Canon 3C(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . . .

[2] 28 U.S.C. § 455(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Shell and Amoco allege that members of the Lashly firm, by reason of their representation in *American Oil*, had access to confidential information (debriefing memoranda of grand jury testimony) in the files of Amoco's counsel, and were present at meetings of counsel for all defendants at which defense strategy was discussed. The Lashly firm contends that it never represented Shell or Amoco in the criminal suit; that it never received confidential information; that, absent proof of receipt of confidential information, disqualification is not warranted; that there is no appearance of impropriety; and that the motion is one of a series of delaying tactics.

Judge Nangle, to whom the case was reassigned, ordered Shell and Amco to file *in camera* "any and all material in their possession which support[s] the allegations made in their motion to disqualify plaintiff's attorney . . . [and] written affidavits setting out all confidences which were exchanged during the pendency of *United States* v. *American Oil Company* . . ." Order of April 20, 1977.

After a hearing, Judge Nangle held that the evidence, including the *in camera* submissions, testimony, affidavits of counsel, and other submissions, established that counsel for the criminal defendants did agree to work together in their defense of the indictment, but that no member of the Lashly firm had represented Shell or Amoco or had received any confidential information. 432

[3] Canon 4. A lawyer should preserve the confidences and secrets of a client.

Canon 5. A lawyer should exercise independent professional judgment on behalf of a client.

Canon 9. A lawyer should avoid even the appearance of professional impropriety.

F. Supp. at 696. The motion to disqualify was therefore denied.

Scope of Review

We apply the scope of review in disqualification cases described in *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975): "The district court bears the responsibility for the supervision of the members of its bar. [Citing authorities.] The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. [Citing authorities.]" 513 F.2d at 571.

Issues

The dispositive issues on appeal are: (1) whether the order denying the motion is separately appealable, and (2) whether the district court abused its discretion in refusing the disqualification of the Lashly firm in view of Canon 4, 5, or 9 of the Code of Professional Responsibility.[4]

OPINION

The question before us is one of first recorded impression: Does a lawyer's representation of A, co-defendant with B in a prior suit, disqualify the lawyer as representative of C against B in a subsequent, related suit?

[4] Judge Nangle found it "beyond dispute" that the prior criminal suit and the present civil litigation are substantially related, and denied appellants' request to revise that finding to merely state that appellee "claimed" such relationship. What appellee *claims* is irrelevant. That the matters be related is a necessary element of appellants' position on the motion to disqualify, as stated in opinions quoted in appellants' brief. Appellants have not requested that this court hold the finding clearly erroneous (nor could they), but only that we refrain from adjudicating the issue. There is no such "issue" before us. Either the matters are related or they are not. If they are not, the motion is and was groundless. It would be an abuse of the judicial process if counsel were to get his adversary disqualified because of representation in a related matter, and then deny that the matter was in fact related.

(1) *The order denying the motion to disqualify is immediately appealable.*

Appeals in federal cases being governed by 28 U.S.C. § 1291 (1958) and 28 U.S.C. § 1292 (1958),[5] appeals prior to final judgment below are commonly sought through the "collateral order" exception to the § 1291 "finality" requirement, created by the Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S.

[5] § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§ 1292. Interlocutory decisions.

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

* * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

541 (1949).[6] An order is appealable under *Cohen* when: (1) it is a "final determination of a claim of right 'separable from, and collateral to,' the rights asserted in the main action;" (2) it presents "'a serious and unsettled question,' rendering it 'too important to be denied review'"; and (3) an immediate appeal is "necessary to preserve rights that would otherwise be lost on review from final judgment." *Community Broadcasting of Boston, Inc.* v. *Federal Communications Commission*, 546 F.2d 1022 at 1025 (DC Cir. 1976).

Courts have distinguished between the granting and denying of motions to disqualify counsel. Orders granting such motions have long been considered immediately appealable under *Cohen*. *Schloetter* v. *Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). The circuits disagree on appealability of orders denying motions. The Second, Third, Fifth, Sixth, Seventh and Tenth Circuits have held that orders denying motions to disqualify meet the requirements of *Cohen*. *Silver Chrysler I, supra* note 6 (overruling prior contrary decisions); *Greene* v. *Singer Co.*, 509 F.2d 750 (3rd Cir. 1971); *Tomlinson* v. *Florida Iron & Metal, Inc.*, 291 F.2d 333 (5th Cir. 1961); *Melamed* v. *ITT Continental Baking Co.*, 534 F.2d 82 (6th Cir. 1976); *Schloetter, supra; Fullmer* v. *Harper*, 517 F.2d 20 (10th Cir. 1975). The D.C. Circuit has held the contrary. *Community Broadcasting, supra.* The Ninth

[6] Section 1292(a)(1) provides for appeals from interlocutory orders refusing injunctions. Although often phrased as injunctions against further participation in a suit, the disqualification of counsel is not considered an injunction in determining appealability. *Fleisher* v. *Phillips*, 264 F.2d 515, 516 (2nd Cir. 1959), *cert. denied* 359 U.S. 1002 (1959) (overruled on other grounds), *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d 800 (2nd Cir. 1974) (Silver Chrysler I); *Cord* v. *Smith*, 338 F.2d 516, 521 (9th Cir. 1964), *clarified* 370 F.2d 418 (9th Cir. 1966). Appeal under § 1292(b), discretionary with the district and appellate courts, is uncertain in result and not generally used. See *Silver Chrysler I, supra.*

Circuit, with no mention of *Cohen*, has held denial of the motion reviewable by writ of mandamus, but not appealable. *Cord, supra.*

The disagreement is over the adequacy of review after final judgment, *Community Broadcasting, supra*, and *Silver Chrysler I, supra* note 6, are representative. In *Community Broadcasting*, the court said: "Although 'collateral' to the main proceeding, an order denying a motion to disqualify does not, in most cases, implicate any claim of right that will be irreparably lost on appeal from final judgment." 546 F.2d at 1028. The D.C. Circuit also expressed the view that "[a] rule allowing interlocutory appeals here would provide litigants with yet another device by which to delay final determination on the merits, and would lead the court to divert its attention from the central issues in the case." 546 F.2d at 1027 (footnote omitted). The court in *Silver Chrysler I* adopted the language and decision of the Supreme Court in *Cohen*: "'We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.' 337 U.S. at 547." 496 F.2d at 805-06. The Second Circuit was influenced by its feeling that "[t]here is no sufficient basis for distinguishing between . . . [orders granting and denying disqualification]. In both situations the order is collateral to the main proceeding yet has grave consequences to the losing party, and it is fatuous to suppose that review of the final judgment will provide adequate relief." 496 F.2d at 805.

We hold that the order denying disqualification is final under *Cohen* and therefore appealable. The question involved is separable from and collateral to the main action; it is serious, and too important to await review in conjunction with the appeal from a final judgment. We recognize the obvious risk that an immediate appeal may be used for delay and diversion. On balance, however,

we consider the risk insufficient to warrant an insistence that trials be conducted under a cloud of potential disqualification. Moreover, disciplinary powers of courts are available to deal with unfounded motions to disqualify and frivolous appeals from their denial.

(2) *Disqualification is not required by Canon 4, 5 or 9.*

Canon 4

Though Canon 4 is an exemplary rule dealing with a particular relationship, the lawyer's personal relationships to others are incapable of comprehensive codification. The broad commitment of the lawyer to respect confidences reposed in him is his talisman. Touching the very soul of lawyering, it rests upon a "privilege" which is that of the client, not that of the lawyer. Inaccurately described as the "lawyer's privilege against testifying," the privilege of clients to bind their lawyers to secrecy is universally honored and enforced as productive of social values more important than the search for truth. Canon 4 is designed to preserve the trust of the client in his lawyer, without which the practice of law, whatever else it might become, would cease to be a profession.

Because Canon 4 is limited by its language to the duty of the lawyer to his client, *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288 (2d Cir. 1975), one who seeks to employ Canon 4 to disqualify opposing counsel must show that counsel to have, or to have had, an attorney-client relationship with an adverse party in the present suit.[7]

[7] The movant must also show (as here) that "the matters involved in the pending suit in which his former attorney represents his adversary are substantially related to the matters or cause of action in which the attorney previously represented him. . . ." *American Can Co.* v. *Citrus Feed Co.*, 436 F.2d 1125, 1128 (5th Cir. 1971) (speaking of former Canons 6 and 37, the predecessors of Canon 4).

The movants in *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976), established an attorney-client relationship by proving they had engaged the attorney whose disqualification was sought. The court in *Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964), found an attorney-client relationship in the advice and representation provided certain parties. It is not here contended or shown that members of the Lashly firm were engaged by, or advised or represented, Shell or Amoco in the prior antitrust suit. The evidence supports the finding of the district court that neither Shell nor Amoco was ever a client of the Lashly firm. Canon 4 is therefore inapplicable.

In reliance on Canon 4, Shell and Amoco argue unnecessarily that the Lashly firm had "access" to confidential information. The attorney-client relationship raises an irrefutable presumption that confidences were disclosed. *In re Yarn Processing*, 530 F.2d at 89. Further, the presumed access of a partner to confidential information results in imputation of that information to others in his firm. *Laskey Bros. of W. Va., Inc.* v. *Warner Bros. Pictures, Inc.*, 224 F.2d 824 at 827 (2nd Cir. 1955). The presumption is an absolute necessity if the goal sought by Canon 4 is to be achieved. Indeed, a failure to apply the presumption in attempted disqualification cases would impinge upon, if not destroy, the underlying client's privilege against disclosure of the information imparted in confidence to his lawyer:

> [T]he court need not, indeed cannot, inquire whether the lawyer did, *in fact*, receive confidential information during his previous employment which might be used to the client's disadvantage. Such an inquiry would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code, for the client's ultimate and compelled response to an attorney's claim of non-access would

necessarily be to describe in detail the confidential information previously disclosed and now sought to be preserved. [*Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 at 571 (1973).]

Absent an attorney-client relationship, no court has applied the presumption inherent in Canon 4. Shell and Amoco's reliance on *NCK Organization Ltd.* v. *Bregman*, 542 F.2d 128 (2d Cir. 1976) and *Hull*, *supra*, for the proposition that an attorney-client relationship is not required for application of Canon 4, is unavailing. In those cases, in-house counsel for the corporate defendants switched sides; in the former by becoming co-counsel of plaintiff's attorney; in the latter by becoming a plaintiff in the suit and retaining the original plaintiff's attorneys. In-house counsel in both cases were presumed to have received information from their former corporate clients, and that information was imputed to the attorneys with whom in-house counsel became associated.

Canon 5

Canon 5 deals with professional zeal. The term "client" in Canon 5 identifies the beneficiary of that zeal. The Canon is broad enough to preclude simultaneous representation of conflicting interests (Ethical Consideration 5-14 of Canon 5) and the use of information against someone who, reposing confidence in the lawyer, supplied that information to the lawyer's client,[8] and to encompass similar ethical considerations involved in the lawyer's exercise of his professional judgment.

The evidence here reflects no failure of compliance with Canon 5, or potential for such failure, on the part of the Lashly firm. Nothing of record indicates an impediment to the exercise of independent professional judgment by the Lashly firm on behalf of its present client, Weber;

[8] H. Drinker, Legal Ethics 106 (1965).

nothing indicates the presence of conflicting interests; nothing indicates that Shell or Amoco, or anyone else, supplied information to Weber, whether in confidential reliance on the Lashly firm or otherwise.

Canon 9

Unlike those of Canons 4 and 5, the broad injunction of Canon 9 against the "appearance of impropriety" relates to the entire spectrum of lawyer conduct. That no unethical or untoward act may have occurred is implicit in the canon's emphasis on "appearance." The conduct under scrutiny must therefore be evaluated in an "eye of the beholder" context, and the lawyer must be disqualified when an actual appearance of evil exists, though there be no proof of actual evil.

Would a member of the public, or of the bar, see an "impropriety" in the mere representation of C against B by a lawyer who had represented B's codefendant in a related prior suit? We think not. The public and the bar are aware that particular lawyers have specialized in certain areas of the law and that their number is limited within specific geographical limits. It would be neither surprising nor unexpected that the same lawyer would appear for plaintiffs and defendants, and that a present adverse party may have been on the other side in a prior case. To hold that every representation against a former client's codefendant in a related matter raises an appearance of impropriety would unnecessarily restrict the choice of counsel available to litigants.

Nor will we presume the lack of integrity involved in a knowing acceptance of representation against a party from whom, or about whom, confidential information had been obtained. If a presumption of integrity, which should be the proud and earned possession of every lawyer, has been destroyed by recent renowned conduct of

some members of the bar, it is neither yet necessary, nor socially advantageous, to substitute a presumption of non-integrity.

As was said in *Woods* v. *Covington County Bank*, 537 F.2d 804 (5th Cir. 1976):

> It does not follow, however, that an attorney's conduct must be governed by standards which can be imputed only to the most cynical members of the public. Inasmuch as attorneys now commonly use disqualification motions for purely strategic purposes, such an extreme approach would often unfairly deny a litigant the counsel of his choosing. Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. . . . Consequently, while Canon 9 does imply that there need be no proof of actual wrongdoing, we conclude that there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur. [537 F.2d at 813 (footnotes omitted).]

Of itself, representation of a codefendant of B raises no presumption that the lawyer obtained confidential information detrimental to B's interests. Nor may confidential information which B may have imparted to its counsel be imputed to the lawyer. The relationship between individual counsel for separate codefendants differs in structure and function from the relationship between partners in a law firm and from the relationship between co-counsel for a single party. Applicability of Canon 9 thus turns on a fact question: Did the Lashly firm obtain confidential information in the course of representing a co-defendant of Shell and Amoco in the prior suit?

The prior criminal action never went to trial. The joint application of all codefendants for change of plea to *nolo contendere* was filed one month after arraignment, with no intervening motions. The record here reflects no preparation of a substantive defense. Discussions among counsel, in which members of the Lashly firm participated, concerned only procedural matters. The memorandum in support of the change of plea was based on legal, not factual matters. Our study of the record, including the *in camera* submissions, persuades us that the Lashly firm obtained no confidential information in the course of representing the former codefendant of Shell and Amoco. The prompt disposal of the earlier suit on a purely procedural basis and the limited discussions among counsel for the defendants convinces us that no basis exists for presuming that confidential information was obtained which presumption would in turn serve as the genesis of an appearance of impropriety.[9] Absent such presumption, the burden of showing an actual imparting of confidential information was upon Shell and Amoco, which have not met that burden on this record.[10]

In the circumstances of this case, refusal to disqualify the Lashly firm is not seen as giving scandal to the profession; or as risking injury to its integrity and honor; or as discouraging public respect for the law or the courts; or as disabling the confidence, respect and trust which underpin the profession; or as limiting the public trust of Canon 9 or its guardianship over the reputation of the lawyer and his profession.

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[9] We need not decide whether an appearance of impropriety might be created by prior representation of a codefendant, where a full, substantive defense was jointly prepared and presented in a completed trial, or whether such representation might shift the burden of proof to the challenged lawyer.

[10] Shell and Amoco point to the self-disqualification of Judge Regan, but that disqualification turned on the appearance of partiality, not impropriety. The Lashly firm, as an advocate, is not expected to be impartial.

Conclusion

The district court's findings of fact were not clearly erroneous, and its refusal to disqualify the Lashly firm was not an abuse of discretion. Accordingly, the order of the district court is affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

77-1571

FRED WEBER, INC.,
Appellee,

vs.

SHELL OIL COMPANY, et al.,
Appellants.

77-1599

FRED WEBER, INC.,
Appellee,

vs.

SHELL OIL COMPANY, et al.,
Appellants.

77-1616

FRED WEBER, INC.,
Appellee,

vs.

STANDARD OIL COMPANY (INDIANA), et al.,
Appellants.

Appeals from the United States District Court
for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for Shell Oil Company and Shell Pipeline Corporation and petition for rehearing en banc filed by counsel for Standard Oil Company and Amoco Oil Company and, being fully advised in the premises,

it is ordered that the petitions for rehearing en banc be, and they are hereby, denied.

Considering the petitions for rehearing en banc as petitions for rehearing, it is ordered that the petitions for rehearing also be, and they are hereby, denied.

December 28, 1977

UNITED STATES DISTRICT COURT
E.D. MISSOURI, E.D.

No. 75-1115C(4)

FRED WEBER, INC.,
Plaintiff,

v.

SHELL OIL COMPANY, SHELL PIPELINE CORPORATION, STANDARD OIL COMPANY, AMERICAN OIL COMPANY, a/k/a AMOCO OIL COMPANY,
Defendants.

June 16, 1977

MEMORANDUM AND ORDER

NANGLE, District Judge.

This matter is before the Court upon the motion of defendants Shell Oil Company and Amoco Oil Company to disqualify plaintiff's attorney. Plaintiff has filed this suit alleging violations of the Sherman and Clayton Acts, and additionally asserting claims of misrepresentation and unconscionability. Plaintiff's attorney is Edward Weakley and the firm, Lashly, Caruthers, Thies, Rava & Hamel.

In 1965, a criminal suit was brought, *United States* v. *American Oil Company, et al.*, D.C., 264 F. Supp. 93, and concluded upon the entry of pleas of nolo contendere. Included among the thirty-five defendants in that suit were the movants herein. It appears from the files in that suit, and it is undisputed herein, that both Paul Rava and John Lashly, presently of Lashly, Caruthers, Thies, Rava & Hamel, represented parties named as defendants in the criminal suit. In addition, Kenneth Thies, who is deceased, and Rexford H. Caruthers represented

defending parties in the criminal suit. None of the members of the firm of Lashly, Caruthers, Thies, Rava & Hamel represented any of the defendants named in the instant suit.

At the time of the criminal suit, John Lashly and Paul Rava were associated with the firm of Lashly, Lashly, Rava, Hyndman & Rutherford. Rexford H. Caruthers, then associated with Guilfoil, Caruthers, Symington & Montrey, joined the Lashly firm in 1968. Kenneth Thies, then associated with Kerth, Thies & Schreiber, joined the Lashly firm in 1973.

Moving defendants herein contend that there was a joint defense conducted in the criminal suit and that members of the Lashly firm had access to confidential information.

The record of events in the criminal suit establish that the indictment was returned on July 22, 1965 and summons were issued returnable on September 8, 1965. On September 8, 1965, all defendants appeared in court and entered pleas of not guilty. On October 6, 1965, defendants filed an application for change of plea. On November 19, 1965, pleas of nolo contendere were accepted. It is beyond dispute that the criminal suit and the present civil litigation are substantially related.

The evidence establishes that counsel for the criminal defendants did agree to work together in their defense of the indictment. It appears that various defense committees were established in connection with the criminal suit and that certain debriefing memoranda of grand jury witnesses were available for viewing by counsel for defendants. It also appears that a committee was established for amassing relevant documents although the evidence as to the results of that committee's efforts indicates that no documents were collected. There is no evidence that any member of the firm of Lashly, Caruthers,

Thies, Rava & Hamel availed himself of the opportunity to review the memoranda, nor did any member receive any other confidential information from any of the other defendants in the criminal suit. Both Mr. Rava and Mr. Lashly testified that they did not review any of the debriefing memoranda nor receive any other confidential information. A number of other defense attorneys also did not avail themselves of the opportunity to review the information collected. A motion requesting leave to enter pleas of nolo contendere was circulated to all counsel and eventually was filed on behalf of substantially all defendants. That motion was, of course, a matter of public record, and further, contained no confidential information.

Canon 9, American Bar Association's Code of Professional Responsibility, requires that "a lawyer . . . avoid even the appearance of professional impropriety". Canon 4 requires that an attorney not divulge the confidences of clients.

An attorney will be disqualified from representing a party whose interests are adverse to a former client's interests where the subject of the litigation is substantially related to the former representation. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corporation*, 518 F.2d 751 (2d Cir. 1975); *Redd* v. *Shell Oil Company*, 518 F.2d 311 (10th Cir. 1975); *Emle Industries, Inc. (Glen Raven Mills, Inc.)* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973); *American Can Company* v. *Citrus Feed Co.*, 436 F.2d 1125 (5th Cir. 1971); *Chugach Electric Association* v. *United States District Court for District of Alaska at Anchorage*, 370 F.2d 441 (9th Cir. 1967), *cert. denied*, 389 U.S. 820, 88 S.Ct. 40, 19 L.Ed.2d 71 (1967); *Cannon* v. *U.S. Acoustics Corporation*, 398 F.Supp. 209 (N.D. Ill. 1975), *modified*, 532 F.2d 1118 (7th Cir. 1976); *Motor Mart, Inc.* v. *Saab Motors, Inc.*, 359 F.Supp. 156 (S.D.N.Y. 1973);

Estates Theatres, Inc. v. *Columbia Pictures Industries, Inc.*, 345 F.Supp. 93 (S.D.N.Y. 1972); *T. C. Theatre Corporation* v. *Warner Bros. Pictures, Inc.*, 113 F.Supp. 265 (S.D.N.Y. 1953).

In the present case, however, neither plaintiff's attorney nor any member of the firm of Lashly, Caruthers, Thies, Rava & Hamel represented any of the defendants herein; defendants were never clients of plaintiff's attorney or the firm. Defendants contend that because a joint defense was allegedly conducted in the criminal suit, defendants were, for the purposes of the Canons of Ethics, at least, clients of the firm during the criminal proceedings. *Cf.*, *Hunydee* v. *United States*, 355 F.2d 183, 185 (9th Cir. 1965) (court excluded evidence on the basis that it was protected by the attorney-client privilege stating that ". . . where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings."); *Continental Oil Company* v. *United States*, 330 F.2d 347 (9th Cir. 1964) (holding privileged from grand jury subpoena grand jury debriefing memoranda shared with counsel of targets of grand jury investigation). These cases, however, do not stand for the proposition which defendants apparently assert; they do not hold that there is an irrebuttable inference from the conduct of a joint defense that confidences were shared which bars subsequent representation. The cases simply hold that confidences which are in fact shared remain privileged. The evidence herein failed to establish that any confidences were revealed.

In *International Electronics Corp.* v. *Flanzer*, 527 F.2d 1288 (2d Cir. 1975), the court noted the increase in the

number of attempts to disqualify counsel. While representation in violation of the Canons of Ethics will not be tolerated in this Court,

> A court should be conscious of its responsibility to preserve a reasonable balance between the need to ensure ethical conduct on the part of lawyers appearing before it and other social interests, which include the litigant's right to freely chosen counsel. *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976).

In order to disqualify plaintiff's counsel, the Court would have to infer, from the agreement that defense counsel would work together in the criminal suit, that confidences were shared, and that these confidences were then revealed to the members of the firm of Lashly, Caruthers, Thies, Rava & Hamel. The Court refuses to take these steps in light of the evidence.

In *Silver Chrysler Plymouth, Inc.*, *supra* at 754, the court noted:

> . . . while this Circuit has recognized that an inference may arise that an attorney formerly associated with a firm himself received confidential information transmitted by a client to the firm, that inference is a rebuttable one.

This same standard, that of a rebuttable inference, should apply where it is alleged that counsel acted in concert in pursuing a joint defense. In the present case, the evidence fails to establish that the firm of Lashly, Caruthers, Thies, Rava & Hamel received any confidential information. Accordingly, the inference that confidential information was shared is rebutted. *Cf.*, *T. C. Theatre Corporation* v. *Warner Bros. Pictures, Inc.*, *supra* at 271, wherein the court held that the evidence failed to establish that an attorney's conferences with defendants' coun-

sel involved disclosure of confidential information, and that absent such evidence, disqualification was not warranted.

Accordingly,

IT IS HEREBY ORDERED that the motion of defendants Shell Oil Company and Amoco Oil Company to disqualify plaintiff's attorney be and is denied.

LASHLY, LASHLY, RAVA, HYNDMAN & RUTHERFORD

Jacob Mark Lashly
John H. Lashly
Paul B. Rava
Elihu Hyndman
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December 7, 1965

Lashly, Lashly & Miller
Formerly

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1880-1957

Kerr-McGee Corporation
Kerr-McGee Building
Oklahoma City, Oklahoma 73102

To LASHLY, LASHLY, RAVA, HYNDMAN & RUTHERFORD

Re: U.S. v. American Oil Company, et al.

For services rendered from September 1, 1965 to date:

Conferences with Carson M. Glass and Lynn Adams on numerous occasions; *review of debriefing statements as applied to Kerr-McGee and Mr. Jack H. Mitchell*; library research on the question of acceptability of a plea of nolo contendere; collection of material and preparation of statements for the company and Mr. Mitchell in support of the application for change of plea to nolo contendere and in mitigation; three informal pre-trial conferences with Judge Regan, *one as a member of the Committee of counsel for all defendants* and two personal to the clients; appearance in court on October 22 and November 19; preparation and filing of probation report for

Mr. Mitchell; research on and drafting of suggestions concerning change of name from Kerr-McGee Oil Industries, Inc. to Kerr-McGee Corporation and obtaining court Order adopting same; numerous telephone conversations with Carson Glass and Lynn Adams; *numerous telephone conversations with other counsel for defense,* Mr. Hunter of Department of Justice, and miscellaneous inter-office conferences in person and by telephone; *attendance at meetings of defense counsel and exchange of correspondence with such counsel* and the clients from time to time throughout the period September 1, 1965 to date (Emphasis added.)	$5,000,00
Out-of-Pocket Expenses (Statement attached)	86.56
	$5,086.56